STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES D. KUENNER,
Personal Representative of the,
ESTATE OF ADAM W. KUENNER,
Plaintiff-Appellant,

v.

FREDERICK BRETON,
Personal Representative of the
ESTATE OF CURTIS J. BRETON,
HB RESORT ENTERPRISES, INC.,
a Michigan Corporation, a/k/a
THE EAGLES NEST,

Defendants

and BEACH BAR, INC.,
a Michigan Corporation, a/k/a THE BEACH BAR,
Defendant-Appellee.
_____/

Supreme Court
Case No. 127704

Court of Appeals
Case No. 247974

Jackson County Circuit Court
Case No. 01-6423-NI

THE ESTATE OF LANCE NATHAN REED,
by and through its Personal Representative,
LAWRENCE REED,
Plaintiff-Appellant,
v.

THE ESTATE OF CURTIS JASON BRETON,
by and through its Personal Representative,
FREDERICK BRETON, and HB RESORT
ENTERPRISES, INC., a Michigan Corporation,
a/k/a THE EAGLES NEST,
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Case No. 247837

Jackson County Circuit Court
Case No. 01-4350-NI

DEFENDANT-APPELLANT BEACH BAR INC.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes/Court Rules/Other Authorities

STATEMENT OF JURISDICTION

On November 18, 2004, the Court of Appeals issued a published per curiam opinion reversing the March 26, 2003 order of the circuit court granting Defendant-Appellant, Beach Bar, Inc., summary disposition (**151a**). Defendant-Appellant filed an application for leave to appeal on December 29, 2004. By order of October 19, 2005, the Court granted the application, thus vesting jurisdiction in the Court pursuant to MCR 7.302(F)(3).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CLEARLY ERR WHEN IT HELD THAT PLAINTIFFS NEED ONLY PRODUCE COMPETENT AND CREDIBLE EVIDENCE OF MR. BRETON'S VISIBLE INTOXICATION IN ORDER TO PROPERLY REBUT THE STATUTORY PRESUMPTION OF NON-LIABILITY?

Plaintiffs-Appellees say: "No".

Defendant-Appellant says: "Yes".

The Court of Appeals said: "No".

II. ASSUMING ARGUENDO THAT THE COURT OF APPEALS PROPERLY HELD THAT THE CORRECT STANDARD FOR REBUTTING THE STATUTORY PRESUMPTION WAS THE COMPETENT AND CREDIBLE EVIDENCE STANDARD, DID THE COURT OF APPEALS CLEARLY ERR IN HOLDING THAT THE CIRCUMSTANTIAL EVIDENCE OF MR. BRETON'S VISIBLE INTOXICATION PRESENTED BY PLAINTIFFS IN THIS CASE WAS SUFFICIENTLY COMPETENT AND CREDIBLE TO REBUT THE STATUTORY PRESUMPTION OF NON-LIABILITY, IN LIGHT OF THE FACT THAT FIVE EYE-WITNESSES TESTIFIED THAT MR. BRETON DID NOT EXHIBIT OBJECTIVE SIGNS OF VISIBLE INTOXICATION?

Plaintiffs-Appellees say: "No".

Defendant-Appellant says: "Yes".

The Court of Appeals said: "No".

STATEMENT OF FACTS AND PROCEEDINGS

This dramshop action was brought on behalf of the Estates of Lance Nathan Reed and James D. Kuenner against Frederick Breton, as personal representative of the estate of Curtis Breton, HB Resort Enterprises d/b/a The Eagles Nest and Defendant-Appellant, Beach Bar, Inc., d/b/a The Beach Bar. Plaintiffs contended that the Beach Bar, through its employees, furnished alcoholic liquor to Curtis Breton while he was visibly intoxicated, in violation of MCL 436.1801(3), and that such violation proximately caused the death of Plaintiffs' decedents. Defendant Beach Bar moved for summary disposition in the circuit court. Defendant argued that, because it was not the last licensee to have served liquor to Mr. Breton, it was entitled to the rebuttable presumption, pursuant to MCL 436.1801(8), that it had not violated the statute by serving Mr. Breton when he was visibly intoxicated. Defendant argued that Plaintiffs had not sufficiently rebutted the statutory presumption of non-liability because the only evidence they presented in support of liability was the opinion testimony of two expert witnesses whose opinions were not based on actual observation of Mr. Breton at or near the time of service at the Beach Bar, and whose opinions were in direct contradiction to the actual observational testimony of five witnesses.

The circuit court granted Defendant summary disposition, finding that Plaintiffs had not presented evidence sufficient to rebut the statutory presumption of non-liability. Plaintiffs filed applications for leave to appeal with the Court of Appeals, which were granted. On October 18, 2005, the Court of Appeals issued its published decision reversing

the circuit court and holding Plaintiffs need only present competent and credible evidence of visible intoxication in order to rebut the statutory presumption. The Court of Appeals held that the evidence offered by Plaintiffs - namely, the expert opinion testimony and the testimony of Mr. Breton's companion - was sufficiently competent and credible evidence of Mr. Breton's visible intoxication to rebut the statutory presumption of non-liability.

This matter is now before this Honorable Court for review on leave granted.

FACTUAL PROCEEDINGS

This action arises out of a tragic automobile accident which occurred at approximately 10:11 p.m. on the evening of April 20, 2001. At that time, Decedent Curtis Breton crossed the centerline on US-127 impacting with a southbound vehicle driven by Plaintiff-Appellee, Adam W. Kuenner. Plaintiff-Appellee, Lance Nathan Reed, was a passenger in Adam Kuenner's vehicle. In the ensuing impact, all three individuals died at the scene.

Earlier that day, Decedent Breton was with a friend, John Thomas Marsh. These two individuals were firefighters together on the Summit Township Fire Department and, at 7:30 a.m., had both finished a twenty-four hour shift (**5a-6a**). Mr. Marsh and Mr. Breton met up at an ice rink in Jackson at around 11:00 a.m. and played drop-in hockey with some other friends (**7a-9a**). The men finished playing hockey at approximately 12:20 p.m. at which time they went to the Firehouse Pub. At the Firehouse Pub, the men each ate a hamburger and drank at least one and possibly two bottles of beer (**10a-13a**).

After leaving the Firehouse Pub at approximately 3:00 p.m., Mr. Marsh and Mr. Breton, along with a fellow firefighter, Todd Moore, purchased a twelve-pack of LaBatt's twelve-ounce beers. The three men then stopped at Mr. Marsh's in-law's house and each man had approximately two of the beers while they were evaluating the repair of a collapsed dock on the in-law's property located on Lake Columbia (**14a**).

At approximately 4:45 p.m., the three men left Mr. Marsh's in-law's property and proceeded to the Beach Bar, owned by Defendant-Appellant, Beach Bar, Inc. While at the Beach Bar, the three men split two pitchers of beer. Mr. Marsh and Mr. Breton left the bar at approximately 6:00 to 6:15 p.m. and went to Mr. Marsh's home to wait for a babysitter for Mr. Marsh's children. While at his home, the men consumed approximately two more beers over the period of 15 to 20 minutes (**15a-18a**). After the babysitter arrived, Mr. Breton and Mr. Marsh went back to the Beach Bar at approximately 7:30 or 8:00 p.m. and had two bottles of beer and a pizza (**19a-20a**). Mr. Marsh testified that he did not observe Mr. Breton to exhibit any of the common and objective signs of intoxication while they were at the Beach Bar:

> Q: All right. Now, while you were at the Beach Bar and at the time that you were ordering these beers and the pizza, could you describe Mr. Breton's appearance or his demeanor?
>
> A: Like he always was. I mean, I have been with him a lot and nothing seemed out of the ordinary. I talked with him.
>
> Q: Was he speaking clearly?

A: Yes.

Q: Was he loud?

A: No.

Q: Was his voice louder than ordinary?

A: Not considering the company that was in the restaurant. He talked so we could hear each other but as far as being obnoxious or anything like that, no.

Q: Did you notice whether he was having any trouble walking?

A: No, not at all.

Q: What can you tell me about your recollection of his eyes, looking into his eyes?

A: Other than he looked like he may have been tired, now that I think about it, I mean, but as far as demeanor and how he was acting and everything, making purposeful communication, I detected nothing.

(21a-22a). With regard to his own level of intoxication, Mr. Marsh testified that, while at the Beach Bar, and up until the time he left that bar, he did not feel the effects of the alcohol he had consumed:

Q: Okay. And did you feel any effects of the alcohol affecting you at that time at all?

A: No.

Q: None whatsoever?

A: Um-um.

Q: Okay. Do you know what time it was you left the Beach Bar to go to the Eagle's Nest?

A: Had to probably been just shortly before 9:00.

Q: And how were you feeling at the time you left the Beach Bar?

A: Fine.

Q: Okay. Did you feel a little high from the beer that you had consumed?

A: Yeah, I could tell I had been drinking?

Q: Do you believe that Curtis probably did as well?

A: Probably.

Q: Did he say anything to you, like he was feeling buzzed or anything like that?

A: No, no.

Q: Did you say anything to him about that?

A: No.

(**23a-24a**).

While at the Beach Bar, Mr. Breton and Mr. Marsh were served by waitress Lindsay Mizerik. Ms. Mizerik testified that she had received training regarding the service of alcoholic beverages and identification of levels of intoxication (**32a-34a**). With specific regard to the night in question, Ms. Mizerik testified that she did not observe Mr. Breton to exhibit any signs of visible intoxication while at the Beach Bar:

Q: Do you recall observing Mr. Breton on the night of April 20, 2001?

A: Yeah, yes.

Q: Do you recall him staggering or swaying while he walked at all?

A: No.

Q: Did he speak to you?

A: Yes.

Q: Did he slur his words?

A: No.

Q: Do you recall or detect an odor of alcohol on his breath?

A: Well, he was drinking beer, so, I mean, I was never that close to him.

Q: Was the odor strong or - -

A: No.

Q: What was the substance of the conversation that you had with Mr. Breton on that night?

A: He was interested in what I was doing after work. I had been waiting on them and I'm not overly friendly but I'm a friendly person, and he wanted to know what I was doing when I got out of work and I said I wasn't really interested basically, and so that's why, that's really the only reason I remember him specifically, was because of that.

Q: Would it be safe to say that he was hitting on you that night?

A: Yeah, that's - - yeah.

Q: And was he persistent in his endeavor? Was he?

A: He wasn't - -

Q: Was he aggressive?

A: No, I mean, he was - - he was not overly aggressive, no.

Q: Did you notice what he was wearing that evening?

A: No.

Q: Did you notice whether his clothes were rumpled or soiled, did he look unkempt?

A: No.

Q: And how many - - did you have separate conversations with him or when you waited on his table, did you come back to their table and then he'd talk to you some more and then you'd leave and come back, is that kind of how that transpired?

A: Right.

Q: Did Curtis have trouble hearing you at all, Mr. Breton?

A: No.

Q: Did he appear to have trouble seeing at all or his motor skills working that evening?

A: Yeah, they seemed to be working fine.

Q: Did he exhibit any erratic behavior?

A: No.

Q: Did you observe him performing any acts out of the ordinary, such as belching or vomiting or anything like that?

A: No, no.

Q: He didn't lack any coordination, to your knowledge, did he lack coordination?

A: No.

Q: Was he aware of his surroundings?

A: Yes.

Q: Did it appear to you that Mr. Breton had consumed alcohol prior to arriving at the Beach Bar that evening, did you notice that?

A: No, I didn't.

Q: Did you have any consideration of cutting Mr. Breton off that evening?

A: No.

(35a-38a).

The two men then left the Beach Bar at approximately 9:00 p.m. and went to the Eagles Nest, owned by Defendant HB Resort Enterprises, Inc., which is located across Clarke Lake from the Beach Bar. Mr. Marsh testified that he did not feel that Mr. Breton was intoxicated beyond the legal limit when Mr. Breton drove the gentlemen from the Beach Bar to the Eagle's Nest:

Q: Did you have any concerns about him driving at that time?

A: No.

Q: Did you have any feelings in your mind that had he been pulled over at that particular time, that he may have been in violation of the law for consumption of alcohol?

A: No.

(**24a-25a**). The two men stayed at the Eagles Nest for approximately fifty-minutes, during which time they split a pitcher of beer. While at the Eagles Nest, the two men ran into their supervisor, Summit Township Fire Department Chief Carl Michael Hendges, and had a short (approximately five minute) conversation with him (**41a**). Chief Hendges testified that he did not believe that Mr. Breton or Mr. Marsh were intoxicated:

Q: While you were talking with them at the table, at their table, did you make any observations regarding their appearance in terms of the consumption of alcohol or its effects on them?

A: No, I didn't. You know, they obviously had a beer in front of them but I didn't think that they were intoxicated.

Q: Okay.

A: They were just in a good mood. They had been outside, they both looked like they had had some sun, you know.

Q: And they were in a good mood, correct?

A: Yes.

(41a).[1]

While at the Eagle's Nest, Mr. Breton also had a conversation with his former hockey coach, Robert Potts. Mr. Potts owns Bob's Country Store on Clarke Lake along with his wife. Mr. Potts sells alcohol from his store and is trained and experienced in identifying people who are intoxicated. Mr. Potts testified that he did not observe any outward signs of intoxication on the part of Mr. Breton:

A: No, there were no outwardly signs on him.

Q: Okay. Did you have a chance to see his eyes?

A: Yes.

Q: And did they appear to be red or bloodshot?

A: No.

Q: Did they appear to be glassy at all?

---

[1]When presented with objective signs of visible intoxication, Chief Hendges was capable of recognizing such signs. Chief Hendges testified that, in his line of work, he was in a position to observe people who are intoxicated (**44a**). In fact, in this case, Chief Hendges' testimony evidenced that he actually observed a distinction between Mr. Breton and Mr. Marsh's appearance and demeanor at two different points in the evening. While Chief Hendge's testified that he did not believe Mr. Breton to be intoxicated while at the Eagle's Nest, shortly after Mr. Breton was last served at the Beach Bar, he did observe Mr. Marsh to exhibit signs of visible intoxication at approximately 11:30 p.m., approximately two and one-half hours after Mr. Breton and Mr. Marsh were served alcohol at the Beach Bar (**44a**). Specifically, Chief Hendges testified that, at 11:30 p.m. or later, it appeared to him that Mr. Marsh had "drank more than when I had seen him earlier." (**44a**).

A: No.

Q: Okay. And did you have the chance to listen to his voice when you were talking to him?

A: Yes.

Q: And did he talk in a manner which, in any way, suggested to you that he was intoxicated?

A: None.

Q: Okay. Did he ever get up and walk around?

A: If he did, I didn't see it.

Q: Okay. And you had the chance to observe his demeanor and the way he was speaking to you?

A: Yes, yes.

Q: Did he, in any way, suggest - - did that demeanor, in any way, suggest to you that he had been drinking?

A: No.

Q: Or drinking in excess?

A: No.

(46a). Mrs. Potts also observed the two men and testified that they were not exhibiting loud behavior:

Q: Did you make any observations at all about those two young men? How they were dressed? How tall they were?

A: Oh, gosh.

Q: Whether they were wearing glasses?

A: No, I couldn't tell you anything like that. They were very quiet. If anything, I didn't notice any, you know, loud conversation or anything like that. We were just eating our meal, and they were very quiet and - -

(48a).

Mr. Marsh testified that, while at the Eagles Nest, he did not notice anything about Mr. Breton's demeanor which would indicate that he was intoxicated:

Q: While you were in the Eagle's Nest and prior to the time that that pitcher arrived at the table, did you notice anything about his demeanor in terms of whether or not he was speaking loudly?

A: No.

Q: Did you notice he was slurring his words?

A: No.

Q: Okay. Did you notice anything about him that was different than when he was sober?

A: Not anything different than when we went out before. I mean, he talks to girls a little more, I guess.

Q: And he was doing that at the Eagle's Nest, correct?

A: He was talking to the one waitress.

Q: Okay.

A: About what, I don't know. I wasn't listening.

Q: So is he the kind of fellow when he drinks alcoholic beverages it's easier for him to talk to girls?

A: No, I wouldn't say that.

Q: Is that what you're saying?

A: Most of his girlfriends, most of his friends are female anyway, so I wouldn't say that.

Q: Okay. Anything at all that you noticed about his demeanor while you were in the Eagle's Nest waiting for that pitcher that was different than when he's sober?

A: No, not that I can honestly say.

Q: Did his eyes appear to be glassy or watery?

A: Not from what I recall, no.

(27a-28a).

After the two men left the Eagles Nest, Mr. Breton dropped Mr. Marsh off at his home at approximately 9:50 p.m.. Mr. Marsh testified that Mr. Breton's eyes did not appear to be red or bloodshot and he had no concerns about the way that Mr. Breton was driving. When Mr. Breton dropped Mr. Marsh off and left, Mr. Marsh did not believe that Mr. Breton was intoxicated:

A: Yep, he dropped me off. I asked him, you know, you okay? Everything's going to be fine? Oh, yeah. Have a good night. That was it.

Q: And the reason you asked him if he was okay was just because he had been drinking?

A: Yeah, just make sure everything was okay, if he was - - because at that

time he still - - he didn't appear - - he still appeared to have all his faculties. I wasn't seeing anything to give me any reason other than have a good night and be careful, which I tell everybody.

(**26a-27a**).

Ms. Mizerik testified that she was unsure whether Mr. Breton returned to the Beach Bar between 10:00 and 11:00 p.m., to ask her out on a date one more time (**39a**). However, no witness testified that Mr. Breton was ever served alcohol at the Beach Bar after he had been served at the Eagles Nest.

At approximately 10:11 p.m., Curtis Breton proceeded northbound onto US-127 and, it is believed, fell asleep at the wheel of his vehicle, resulting in the impact with the southbound vehicle containing Plaintiffs' decedents.

Mr. Marsh testified as follows about how he physically felt after he had returned home and later heard about the accident and Mr. Breton's death:

Q: Okay. Now, how were you feeling when you left the Eagle's Nest in terms of the consumption of alcohol that you had - -

A: After - -

Q: - - used?

A: After I was home and a period of time went by and I heard of this news, that's the first time in the whole night where I honestly felt myself that with all the shock and everything, that - -

Q: That you had had too much to drink?

A: That was - - honest.

Q: Tell me how you felt.

A: Horrible, just numb, just mad, confused.

Q: But tell me about how you felt about the effects of alcohol on you.

A: I can't be for certain if it was the whole - - if it was alcohol or if it was the combination of the two. It was a feeling, I can't describe it.

(**28a-29a**). Mr. Marsh testified that it was only after he had been informed of the accident, a little over one hour after he had consumed alcohol at the Eagles Nest and more than two hours after he had last consumed alcohol at the Beach Bar, that he felt intoxicated (**30a**).

PROCEEDINGS BELOW

Plaintiff James Kuenner, as personal representative of the estate of Adam Kuenner, and Plaintiff Lawrence Reed, as personal representative of the estate of Lance Nathan Reed, filed dram shop actions against Frederick Breton as personal representative of the estate of Curtis Breton, HB Resort Enterprises d/b/a The Eagles Nest and defendant Beach Bar, Inc., d/b/a The Beach Bar. Plaintiffs' complaints were consolidated in the circuit court. The Beach Bar filed a motion for summary disposition on the basis that Plaintiffs had failed to raise a genuine issue of material fact that defendant was liable under the dram shop statute, MCL §436.1801, *et. seq.*, for furnishing alcohol to Mr. Breton when he was visibly intoxicated. Specifically, defendant argued that the rebuttable presumption of non-liability found in MCL §436.1801(8) applied, as The Beach Bar was not the last establishment to have furnished alcohol to Mr. Breton and Plaintiffs could not present evidence sufficient to rebut the presumption that Mr. Breton was not visibly intoxicated when he was served at the Beach Bar.

A hearing on defendant's motion was held in the circuit court on January 21, 2003. At the hearing, Plaintiffs argued that, even if the Beach Bar was not the last establishment to have furnished liquor to Mr. Breton, Plaintiffs had offered affidavits of two expert toxicologists which stated that Mr. Breton was likely visibly intoxicated when he was served at the Beach Bar, and that such affidavits were sufficient evidence to rebut the presumption of non-liability (**124a-125a**). Specifically, plaintiff Reed presented a report from Dr. Michael A. Evans which concluded as follows:

> It is my professional opinion, based on the above information and on the facts of the case as identified in Table II, that Mr. Breton was visibly intoxicated at the time he was served alcoholic beverages at the Eagle's Nest Bar ***and when he returned to the Beach Bar.*** Furthermore, based on the Blood Alcohol Concentration of 0.215% at the time of the accident, Mr. Breton had a minimal of 11 alcoholic drinks in his system ***when he left the Beach Bar (just before the accident)***. Based on either his estimated Blood Alcohol Concentration or the estimated number of alcoholic drinks in his system ***when he left the Beach Bar*** it is my opinion that Mr. Breton would have exhibited slurred speech, clumsiness, impairment of coordination, impaired balance, stumbling, staggering gait, drowsiness, confusion, and disorientation while at both the Eagle's Nest Bar and the Beach Bar.

(57a) (emphasis added). According to Dr. Evans' opinion, Mr. Breton would have appeared visibly intoxicated when served at the Eagles Nest and when he "returned" to the Beach Bar

"just before the accident."[2] Dr. Evans' report offered no opinion as to whether Mr. Breton would have appeared visibly intoxicated at the time he was actually furnished alcohol at the Beach Bar.[3]

Likewise, plaintiff Kuenner presented a report from Dr. K.P. Gunaga who concluded as follows:

> It is also my professional opinion that Mr. Breton was visibly intoxicated at the time he was served alcoholic beverages at The Eagles Nest Bar and the Beach Bar. Based on the total number of drinks he consumed, approximately 24-25 beers, during a 9 hour period and the blood alcohol content of 0.215% at the time of the accident (due to a minimum of 11-12 alcoholic drinks in the system), Mr. Breton definitely had to have exhibited slurred speech, impairment of balance and coordination, drowsiness, confusion and disorientation while drinks were last served at both The Eagles Nest Bar and the Beach Bar.

(**86a**).[4]

The circuit court appeared to agree with Plaintiffs that the offered expert testimony alone, despite eye-witness testimony to the contrary, was sufficient circumstantial evidence

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[2]Dr. Evans opined that Mr. Breton consumed approximately 22 or more alcoholic drinks prior to the accident (**54a**).

[3]Although Plaintiffs argued that, based on the testimony of Ms. Mizerik, there existed a genuine issue of material fact as to whether Mr. Breton returned to the Beach Bar just prior to the accident, both the trial court and the Court of Appeals recognized that there existed no record evidence that Mr. Breton was ever served alcohol upon his return. Accordingly, Dr. Evans' opinion that Mr. Breton would have appeared visibly intoxicated at the time he returned to the Beach Bar is irrelevant because there existed no genuine issue of material fact that anyone at the Beach Bar furnished Mr. Breton alcohol at that time.

[4]Dr. Gunaga opined that Mr. Breton consumed approximately 24-25 beers during a 9 hour period, starting at approximately 1:00 p.m. on the day of the accident (**86a**).

to establish a prima facie case of liability under the statute but questioned whether a higher degree of evidence was required to rebut the statutory presumption and asked the parties to prepare supplemental briefs on the issue:

> Was there a prima facie case enough to go to the jury? And I think they're saying that expert testimony, circumstantial is enough to get over that threshold.
>
> I think the rebuttable presumption is a somewhat different threshold.
>
> ***
>
> So I guess I'd like an additional brief on the issue of the difference between the prima facie standard and the rebuttable presumption standard.
>
> Is this the – – is it the same type of standard that's in the owner's liability statute of positive, unequivocal, strong and credible evidence. And they cite a case called Krisher (phonetic) at 331 Mich 699 and Lahey (phonetic) at 23 Mich App 556. And I think that is the real issue.

(**142a-143a**).

Upon review of supplemental briefs submitted by both parties, the circuit court granted the Beach Bar summary disposition. In its opinion, which was entered on March 26, 2003, the circuit court held that Plaintiffs had not created a genuine issue of material fact regarding the identity of the last bar to serve Mr. Breton and that the Beach Bar was entitled to the statutory presumption of non-liability. Although the court then held that the expert opinion testimony offered by Plaintiffs was sufficient to raise a genuine issue of material fact as to a prima facie case of visible intoxication, it further held that Plaintiffs failed to present the positive, unequivocal, strong and credible evidence necessary to rebut the statutory presumption (**146a**).

APPELLATE PROCEEDINGS

Plaintiffs filed separate applications for leave to appeal the circuit court's order in the Court of Appeals. The Court of Appeals granted leave in an order dated August 1, 2003.

Oral argument in the Court of Appeals occurred on November 2, 2004. On November 18, 2004, the Court of Appeals issued a published per curiam opinion reversing the circuit court's order granting the Beach Bar summary disposition and remanded the case for a jury trial (**151a**). The Court of Appeals held that, in order to rebut the statutory presumption of non-liability, Plaintiffs need only present "competent and credible evidence that it was more probable than not that Mr. Breton was visibly intoxicated when he was served at defendant's bar." The Court of Appeals went on to hold that Plaintiffs had presented competent and credible evidence sufficient to rebut the presumption in this case:

> Plaintiffs presented circumstantial evidence in this regard. Mr. Marsh testified that he felt the effects of the alcohol he consumed when the men left the defendant's bar and he assumed Mr. Breton felt the same. The expert toxicologists' reports indicated that Mr. Breton had a significant amount of alcohol in his system when served at defendant's bar. Based on this amount, the experts believed that Mr. Breton would have exhibited visible signs of intoxication at that time. "Circumstantial evidence in support of or against a proposition is equally competent with direct." As plaintiffs presented competent and credible evidence that Mr. Breton was visibly intoxicated when he was served at defendant's bar, the trial court improperly found that plaintiffs failed to overcome the statutory presumption of non-liability. Plaintiffs presented sufficient evidence to create a genuine issue of material fact to place this issue before the trier of fact and defendant's motion for summary disposition was improperly granted.

(**156a**). Defendant Beach Bar, Inc. sought this Court's review of the Court of Appeals' decision by filing an application for leave to appeal on December 29, 2005. By order of

October 19, 2005, the application was granted. Defendant now urges this Court to reverse the judgment of the Court of Appeals and reinstate the circuit court's grant of summary disposition in favor of Defendant.

INTRODUCTION

The Court of Appeals wrote the statutory presumption of non-liability out of existence by requiring the dramshop Plaintiffs to present nothing more than prima facie evidence of Mr. Breton's visible intoxication to rebut the presumption and present their claims to a jury. Specifically, the Court of Appeals held that, in order to rebut the presumption that the Beach Bar did not violate the dramshop act, Plaintiffs need present only competent and credible evidence that it was more likely than not that Mr. Breton was visibly intoxicated when served alcohol at the Beach Bar. Despite the direct evidence of five eye-witnesses' testimony that Mr. Breton was not visibly intoxicated either at or after the time of service at the Beach Bar, the Court further held that the circumstantial evidence presented by Plaintiffs - namely, the testimony of Mr. Marsh that he assumed Mr. Breton probably felt the effects of the alcohol he consumed, and the opinion of two toxicologists that, given his blood alcohol content, Mr. Breton would have been exhibiting objective signs of intoxication at the time of service at the Beach Bar - was sufficiently competent and credible to rebut the presumption of non-liability.

Defendant argues that the Court of Appeals clearly erred in holding that the competent and credible standard was the proper evidentiary standard. Instead, Defendant contends that the circuit court properly held that Plaintiffs must present something more than prima facie evidence of visible intoxication to rebut the presumption - Plaintiffs were required to present positive, unequivocal, strong and credible evidence of Mr. Bretons' visible intoxication to

overcome this rebuttable presumption of non-liability. Defendant has always contended that the circumstantial and non-observational evidence presented by Plaintiffs in this case was not sufficient even to establish a prima facie case of dramshop liability against the Beach Bar - even if the Beach Bar were the last bar to have served Mr. Breton. If the statutory presumption is to be given any effect, it must place upon Plaintiffs an increased burden of producing evidence of Mr. Breton's visible intoxication over and above the establishment of a prima facie case. As Plaintiffs could not and did not produce sufficiently positive, unequivocal, strong and credible evidence of Mr. Breton's visible intoxication, in light of the testimony of five eye-witnesses to the contrary, Defendant was entitled to summary disposition.

However, even assuming that the Court of Appeals applied the correct evidentiary standard, it clearly erred in holding that Plaintiffs had satisfied even this standard by presenting the circumstantial and non-observational evidence of Mr. Marsh's testimony and Drs. Evans' and Gunaga's opinions. The circumstantial evidence presented by Plaintiffs in this case, particularly in light of the contradictory direct observation testimony of five eye-witnesses, was not sufficiently competent nor credible to establish that it was more probable than not that Mr. Breton was visibly intoxicated at the time he was served alcohol at the Beach Bar. Accordingly, even if the Court of Appeals properly held that only competent and

credible evidence was necessary to rebut the statutory presumption of non-liability, it clearly erred in holding that Plaintiffs had produced sufficiently competent and credible evidence in this case.

As discussed below, the Court of Appeals' holding in this case effectively writes the statutory presumption of non-liability out of existence by imposing no more of a hurdle on Plaintiffs to prove liability against the *last* bar than to prove liability against *any* bar or licensee earlier in the chain of service. In this case, the Court of Appeals allowed Plaintiffs to proceed to a jury with only the opinion testimony of two expert toxicologists that Mr. Breton likely would have exhibited objective signs of visible intoxication, despite the testimony of five eye-witnesses who actually observed Mr. Breton at the relevant time period and affirmatively denied the presence of any such objective signs.

If allowed to stand, the Court of Appeals' holding in this case will cause material injustice to Defendant specifically, and all dramshop defendants in general, as it effectively writes the statutory presumption out of existence. No other published case in Michigan has addressed the issue of what is the proper standard to rebut the statutory presumption found in MCL §436.1801(8). Under the Court of Appeals' decision in this case, the circumstantial evidence sufficient to rebut the statutory presumption of non-liability for any licensee, other than the last licensee, is the same circumstantial evidence sufficient to establish a prima facie case against the last licensee. The Court of Appeals has rendered the statutory presumption meaningless and has effectively thwarted the Legislature's intent of seeking to prevent

"shotgun" dramshop litigation and limiting liability only to those licensees who actually violated the statute. Accordingly, Defendant requests that this Court reverse the Court of Appeals' opinion and grant the Beach Bar summary disposition of Plaintiffs' claims under the dramshop act.

STANDARD OF REVIEW

This matter was decided in the circuit court on Defendant-Appellant's motion for summary disposition pursuant to MCR 2.116(C)(10). The standard of review applicable to the grant or denial of a motion for summary disposition is *de novo*. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

ARGUMENT

I. THE COURT OF APPEALS CLEARLY ERRED WHEN IT HELD THAT PLAINTIFFS NEED ONLY PRODUCE COMPETENT AND CREDIBLE EVIDENCE OF MR. BRETON'S VISIBLE INTOXICATION IN ORDER TO PROPERLY REBUT THE STATUTORY PRESUMPTION OF NON-LIABILITY.

The Michigan dram shop statute, MCL §436.1801 *et. seq.*, creates a statutory presumption in favor of a defendant licensee whereby a licensee, who was not the last licensee to have served alcohol to the allegedly intoxicated person, is presumed to have *not* committed any act giving rise to a cause of action under the statute. Specifically, MCL §436.1801(8) provides:

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

MCL §436.1801(8).

It was Plaintiffs' position that, in order to rebut the statutory presumption, a plaintiff need do no more than present a prima facie case of visible intoxication. Defendant argued that something more than prima facie evidence of visible intoxication is necessary to rebut the presumption or else the presumption presents no benefit to the defendant and the statutory provision is rendered meaningless. For the reasons that follow, the circuit court correctly held that a plaintiff must present positive, unequivocal, strong and credible evidence to overcome this statutory rebuttable presumption of non-liability. In other words, in addition

to presenting a prima facie case, a plaintiff also must present positive, unequivocal, strong and credible evidence that the AIP was in fact visibly intoxicated when furnished alcohol by a licensee who was not the last licensee to have served the AIP.

A. Common sense dictates that Plaintiffs bear an increased burden of production on the issue of visible intoxication.

A presumption is a procedural device which operates to shift the burden of production between parties. *Widmayer v Leonard*, 422 Mich 280, 286; 373 NW2d 538 (1985). A presumption never shifts the ultimate burden of persuasion which always remains with the party upon whom it is originally imposed. *Id.* See also MRE 301. A presumption operates such that one party benefits from the presumption with respect to a particular fact or inference, while the other party has an increased burden of production with regard to that fact or inference.

The most commonly recognized statutory presumptions are those that favor the plaintiff. For example, the Michigan owner's liability statute contains a rebuttable presumption wherein a driver, who is an immediate family member of the vehicle owner, is presumed to be driving a vehicle with the owner's permission. MCL 257.401(1). Another example of a statutory presumption favoring the plaintiff is found in the rear-end collision statute wherein a rebuttable presumption of negligence can be inferred in cases where one vehicle rear-ends another. MCL 257.402. In both of these situations, while the burden of persuasion always remains with the plaintiff, the plaintiff benefits from the presumed fact or inference.

In those situations, the presumption shifts the burden of production to the defendant to rebut that fact or inference. Under the owner's liability statute, a defendant may rebut the presumption of permission with "positive, unequivocal, strong, credible" evidence of the non-existence of such permission. *Krisher v Duff*, 331 Mich 699, 706; 50 NW2d 332 (1951).[5] Likewise, a defendant may rebut the presumption of negligence which results from a rear-end collision with factual evidence establishing an adequate or legally sufficient excuse under the facts and circumstances of the case. *Baumann v Potts*, 82 Mich App 225; 226 NW2d 766 (1978).

The presumption at issue in this case, in contrast to those discussed above, is a presumption which benefits the defendant. While there exists no case authority which specifically analyzes the evidentiary standards applicable to the statutory presumption found in MCL §436.1801(8), common sense dictates that a plaintiff must incur an increased burden of production with respect to the issue of visible intoxication under the statute. A presumption in favor of a defendant must, at the very least, procedurally benefit a defendant in the same manner as the presumptions discussed above procedurally benefit a plaintiff. In other words, a presumption in favor of a defendant must increase a plaintiff's burden of

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[5]Another panel of the Court of Appeals has stated that the "positive, unequivocal, strong and credible" standard announced in *Krisher, supra* is synonymous with "clear, positive and uncontradicted." See *Palacio v Aikens* at Footnote 2, unpublished per curiam opinion of the Court of Appeals (No. 228165, May 7, 2002) (**101a**).

production, at least somewhat, on the fact or inference which is the subject of the presumption - in this case, the question of visible intoxication.

Applying this principle to the instant case inevitably results in an increase in Plaintiffs' burden of production on the issue of whether the Beach Bar actually furnished alcohol to Mr. Breton in violation of the statute (i.e. while he was visibly intoxicated). This Court has previously held that in order to sufficiently rebut a presumption, "at the very least there must be clear, positive and credible evidence *opposing* the presumption." *Garrigan v LaSalle Coca-Cola Bottling Co.*, 362 Mich 262, 264; 106 NW2d 807 (1961), (emphasis in original), citing *Gillett v Michigan United Traction Co*, 205 Mich 410; 171 NW 536 (1919) (regarding presumption that a plaintiff is free from contributory negligence); *Cebulak v Lewis*, 320 Mich 710; 32 NW2d 21 (1948) (regarding presumption of consent under owner's liability statute); 5 ALR2d 186; *Krisher, supra* (regarding the owner's liability statute's presumption of consent); and *Briteen v Updyke*, 357 Mich 466; 98 NW2d 660 (1959) (regarding presumption of due care on part of plaintiff). See also, *Petrosky v Dziurman*, 367 Mich 539; 116 NW2d 748 (1962) ("clear, positive and credible evidence" or "direct, positive and credible rebutting evidence" necessary to rebut statutory presumption of non liability). Clear, positive and credible evidence has been described as evidence which is so conclusive that reasonable and unprejudiced minds could not fail to be convinced that the presumed fact

is untrue.[6] See *Gillett, supra* at 421. See also *Potts v Shepard Marine Construction Co.*, 151 Mich App 19, 27-28; 391 NW2d 357 (1986) (clear, positive and credible evidence is evidence that leads to an inevitable conclusion by all reasonable minds that the presumed fact is untrue).

The Court of Appeals reversibly erred in holding that the proper evidentiary standard is that of "credible and competent" evidence. The evidentiary standard applied by the Court of Appeals in this case is inconsistent with Michigan case law because it fails to recognize that, in addition to being competent and credible, the evidence sufficient to rebut the statutory presumption must also be positive, direct, and clear. In light of the applicable definitions of "clear, positive and credible" evidence, the proper evidentiary standard necessarily requires rebutting evidence to be conclusive and unequivocal. *Potts, supra*; *Gillet, supra.*

Under the standards applied by Michigan courts with respect to statutory presumptions such as those discussed above, the circuit court correctly held that Plaintiffs were required to offer positive, unequivocal, strong, credible evidence to rebut the presumption of non-liability. Defendant argues that, even if the appropriate standard is something less than positive, unequivocal, strong and credible, at the very least, something more than prima facie evidence, such as direct evidence (as opposed to mere expert testimony unsupported by direct

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[6] *Black's Law Dictionary*, 8th Edition defines "positive evidence" as synonymous with "direct evidence: evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."

observations) is required to support the allegation that Mr. Breton was in fact visibly intoxicated at a time when he was furnished alcohol at the Beach Bar.

Plaintiffs argued, and the Court of Appeals agreed, that the statutory presumption imposes on Plaintiffs nothing more than offering evidence sufficient to establish a prima facie case of visible intoxication. This simply cannot be as, absent some increase in Plaintiffs' burden of proof on the issue of visible intoxication, the statutory presumption would have no legal effect whatsoever. If it were so, the plaintiff offering a bare minimum to make a prima facie case would be able to avoid summary disposition (or a directed verdict) whether or not the presumption applied, while the plaintiff who is unable to present a bare prima facie case will see summary disposition (or a directed verdict) rendered in favor of the defendant, again, regardless of whether the presumption applied.

In order to make out even a prima facie case of liability under the dramshop statute against the Beach Bar, Plaintiffs had to come forward with at least some evidence of Mr. Breton's visible intoxication.[7] Without some minimal amount of evidence, Plaintiffs' claims against the Beach Bar could never reach the jury. Add to this the fact that the statute affords the Beach Bar the presumption of non-liability because it was not the last bar to serve alcohol to Mr. Breton on the night in question, and it becomes counterintuitive to expect that Plaintiffs can rely upon the same circumstantial evidence in order to rebut the presumption.

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[7]As discussed *infra*, it is Defendant's position that the circumstantial expert opinion evidence offered by Plaintiffs was not enough, on its own, to establish even a prima facie case of liability.

The effect of the presumption, to be given any effect, must be to increase Plaintiffs' burden of production and require them to offer evidence of visible intoxication over and above the circumstantial evidence offered to establish prima facie liability. In this case, the only evidence Plaintiffs had to offer in support of their allegation that Mr. Breton was served by the Beach Bar while he was visibly intoxicated was the circumstantial expert opinions of Drs. Evans[8] and Gunaga, that, based on his blood alcohol content, he likely was exhibiting visible signs of intoxication at the time of service.[9] Plaintiffs were left with only these expert opinions because all eye-witnesses affirmatively denied that Mr. Breton exhibited objective signs of intoxication. Under both the circuit court's and the Court of Appeals' opinions, the expert opinions were sufficient to establish a prima facie case against the Beach Bar, had it been the last bar at which Mr. Breton was served. However, under the Court of Appeals' analysis, Plaintiffs can rely upon the same expert testimony, and need offer nothing more, to also rebut the statutory presumption of non-liability. Under this analysis, the statutory presumption - the procedural device employed by the legislature to increase Plaintiffs' burden of production against anyone other than the last bar - has no effect.

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[8]Dr. Evans' opinion as to Mr. Breton's degree of visible intoxication was limited to the time *after* Mr. Breton had been served alcohol at the Beach Bar (**57a**).

[9]Although the Court of Appeals also relied upon the testimony of Mr. Marsh that he, himself, felt the effects of the alcohol he consumed and assumed that Mr. Breton did too, as explained, *infra*, such testimony cannot constitute circumstantial evidence of Mr. Breton's visible intoxication.

Only by requiring the plaintiff to present more than prima facie evidence of visible intoxication can the defendant licensee, who was not the last licensee to serve the AIP, benefit from the statutory presumption of non-liability. Accordingly, the circuit court correctly held that the presumption increased Plaintiff's burden of production as to the issue of visible intoxication and the Court of Appeals clearly erred in reversing the circuit court's order granting defendant summary disposition.

B. Principles of statutory interpretation dictate that Plaintiffs must offer more than prima facie evidence of visible intoxication to rebut the statutory presumption.

It is well settled law that the primary goal of judicial interpretation of statutes is to ascertain *and give effect to* the intent of the legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Statutory provisions should be given the reasonable construction that best accomplishes the purpose of the statute, *id.*; and no provision should be interpreted in a manner which would render the effect of the provision a nullity. *People v Carlson,* 466 Mich 130, 138; 644 NW2d 704 (2002); *Omelenchuk v City of Warren*, 466 Mich 524, 530; 647 NW2d 493 (2002); *State Bar of Michigan v Galloway*, 124 Mich App 271, 277; 335 NW2d 475 (1983) ("[e]very part of a statute must be given effect"), *citing*, *Melia v Employment Security Comm*, 346 Mich 544; 78 NW2d 273 (1956).

As the statutory provision at issue in this case is clear and unambiguous, review of legislative history is not necessary for purposes of statutory construction. *Kenneth Henes*

Special Proj Procurement, Marketing and Consulting, Corp v Continental Biomass Indus, Inc, 468 Mich 109; 659 NW2d 597 (2003). However, the House Legislative Analysis of the legislation that became 1986 PA 176 (**95a**), which includes the presumption at issue in this case, is informative as to the legislative purpose of the statutory presumption. While the legislative history offers no guidance as to the level of evidence required to rebut the presumption, what is clear is that, by affirmatively inserting the rebuttable presumption provision into the statute, the legislature intended to limit liability under the statute to those establishments who last served alcohol to a visibly intoxicated person, unless sufficiently proven otherwise. The legislature chose the vehicle of a rebuttable presumption as a means to effectuate its intent to limit liability in this manner.

In addition, well-established definitions and the common understanding of the relevant legal terminology weighs in favor of requiring a plaintiff to offer more than circumstantial prima facie evidence of visible intoxication to rebut the statutory presumption. *Black's Law Dictionary* provides the following relevant definitions:

> **Presumption.** A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.
>
> ***rebuttable presumption.*** An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.
>
> ***prima facie evidence.*** Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

Black's Law Dictionary, eighth edition (emphasis added). In addition, rebutting evidence has been defined as follows:

> **REBUTTING EVIDENCE.** Evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party.
>
> ***Also evidence given in opposition to a presumption of fact or a prima facie case; in this sense, it may be not only counteracting evidence, but evidence sufficient to counteract, that is, conclusive.***

Black's Law Dictionary, revised fourth edition (emphasis added). Evidence sufficient to rebut the statutory presumption must be more than prima facie evidence; it must be *conclusive* evidence that the defendant licensee served the AIP while he was visibly intoxicated.

Given the clear intention of the legislature, reflected in both the legislative history and the very fact of the statutory amendment itself, it cannot seriously be contended that the statutory presumption has no real effect, i.e., that the plaintiff is required to do no more than was required prior to the amendment -- make out a prima facie case. The rules of statutory construction, as well as common sense, dictate that the presumption must impose an additional burden of production on the plaintiff, something more than merely establishing prima facie evidence of visible intoxication. The Court of Appeals clearly erred by requiring of Plaintiffs nothing more than the presentation of circumstantial prima facie evidence of Mr. Breton's visible intoxication.

II. ASSUMING ARGUENDO THAT THE COURT OF APPEALS PROPERLY HELD THAT THE CORRECT STANDARD FOR REBUTTING THE STATUTORY PRESUMPTION WAS THE COMPETENT AND CREDIBLE EVIDENCE STANDARD, THE COURT OF APPEALS CLEARLY ERRED IN HOLDING THAT THE CIRCUMSTANTIAL EVIDENCE OF MR. BRETON'S VISIBLE INTOXICATION PRESENTED BY Plaintiffs IN THIS CASE WAS SUFFICIENTLY COMPETENT AND CREDIBLE TO REBUT THE STATUTORY PRESUMPTION OF NON-LIABILITY, IN LIGHT OF THE FACT THAT FIVE WITNESSES TESTIFIED THAT MR. BRETON DID NOT EXHIBIT OBJECTIVE SIGNS OF VISIBLE INTOXICATION.

The circuit court held that Plaintiffs' proffered expert opinion evidence was sufficient to establish a prima facie case of visible intoxication but that such evidence was insufficient to rebut the statutory presumption of non-liability. The Court of Appeals also found that circumstantial evidence, like the expert opinions in this case, was sufficient, in and of itself, to establish dramshop liability absent the presumption. However, the Court of Appeals went a step further and held that the same circumstantial evidence sufficient to establish a prima facie case of liability was also legally sufficient to rebut the statutory presumption of non-liability afforded the Beach Bar.

Specifically, the Court of Appeals held that Plaintiffs needed to present only "competent and credible evidence that it was more probable than not that Mr. Breton was visibly intoxicated when he was served at defendant's bar." The Court of Appeals did not provide a definition of competent and credible evidence, but the following definitions are provided in Black's Law Dictionary:

competent evidence. 1. See *admissible evidence.* 2. See *relevant evidence.*

> ***admissible evidence.*** Evidence that is relevant and is of such a character (e.g. not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it. - Also termed *competent evidence; proper evidence; legal evidence.*
>
> ***relevant evidence.*** Evidence tending to prove or disprove a matter in issue.

credible evidence. Evidence that is worthy of belief; trustworthy evidence.

Black's Law Dictionary, Eighth Edition. The Court went on to hold that Mr. Marsh's testimony regarding the effects of alcohol on him and the opinions of Drs. Evans and Gunaga satisfied the "competent and credible" evidentiary standard necessary to rebut the presumption.

For the reasons stated below, Defendant contends that the circumstantial evidence of Mr. Breton's visible intoxication submitted by Plaintiffs and relied upon by the Court of Appeals could not have been sufficiently competent and credible to rebut the statutory presumption in this case. Specifically, Defendant contends that expert testimony alone is insufficient to establish even a prima facie case of liability under the dram shop statute even where the statutory presumption does *not* apply; and is certainly insufficient to do so where the presumption of non-liability is in effect. Accordingly, summary disposition of Plaintiffs' claims was appropriate and the Court of Appeals clearly erred in reversing the circuit court's order of summary disposition.

A. **Circumstantial evidence consisting of the testimony of Mr. Marsh that he felt the effects of the alcohol he consumed was not competent and credible evidence of Mr. Breton's visible intoxication sufficient to rebut the statutory presumption.**

The Court of Appeals found that Mr. Marsh's testimony constituted competent and credible evidence of Mr. Breton's visible intoxication, sufficient to rebut the statutory presumption of non-liability. Specifically, the Court of Appeals stated "Mr. Marsh testified that he felt the effects of the alcohol he consumed when the men left defendant's bar and he assumed Mr. Breton felt the same." (156a) However, Mr. Breton did not testify that he felt the effects of alcohol when he left the Beach Bar - he specifically denied feeling the effects:

Q: Okay. And did you feel any effects of the alcohol affecting you at that time at all?

A: No.

Q: None whatsoever?

A: Um-um.

(23a) **Exhibit C**, page 41. Instead, upon further questioning, Mr. Marsh testified that, at the time he left the Beach Bar, he felt "fine", but "a little high" from the beer he had been drinking, and believed that Mr. Breton probably did as well:

Q: Okay. Do you know what time it was you left the Beach Bar to go to the Eagle's Nest?

A: Had to probably been just shortly before 9:00.

Q: And how were you feeling at the time you left the Beach Bar?

A: Fine.

Q: Okay. Did you feel a little high from the beer that you had consumed?

A: Yeah, I could tell I had been drinking.

Q: Do you believe that Curtis probably did as well?

A: Probably.

Q: Did he say anything to you, like he was feeling buzzed or anything like that?

A: No, no.

Q: Did you say anything to him about that?

A: No.

(23a-24a).

Based upon a review of Mr. Marsh's actual testimony, the Court of Appeals clearly erred in stating that he felt the effects of the alcohol he had consumed and assumed Mr. Breton did too. Accordingly, the Court of Appeals' reliance upon this characterization of Mr. Marsh's testimony as sufficient evidence to rebut the statutory presumption of non-liability was in error and merits reversal.

However, even assuming that the Court of Appeals' characterization of Mr. Marsh's testimony was proper, such testimony cannot constitute competent and credible evidence of Mr. Breton's visible intoxication sufficient to rebut the statutory presumption of non-liability. Mr. Marsh's testimony constitutes circumstantial evidence of his *own* intoxication and,

possibly, circumstantial evidence of his *own* visible intoxication.[10] Mr. Marsh's assumption that Mr. Breton "probably" felt the effects of the alcohol he had been drinking is neither competent nor credible as it does not tend to prove that Mr. Breton exhibited objective signs of intoxication at the time he was served at the Beach Bar. This is particularly true when Mr. Marsh's testimony is reviewed against the backdrop of Mr. Marsh's remaining testimony - and that of four other eye witnesses - that Mr. Breton did not exhibit any objective signs of visible intoxication. Accordingly, the Court of Appeals clearly erred in holding that Mr. Marsh's testimony constituted circumstantial evidence of Mr. Breton's visible intoxication sufficient to rebut the statutory presumption, either on its own or in combination with the expert opinions of Drs. Gunaga and Evans.

B. Expert opinion testimony alone is insufficient to establish a prima facie case of visible intoxication.

All of the factual, substantive, eye-witness testimony presented in this case affirmatively established that Mr. Breton was ***not*** visibly intoxicated at the time he was served alcohol at the Beach Bar. (John Marsh: **21a-22a, 24a-25a, 26a-28a**); (Chief Hendges: **41a**); (Robert Potts: **46a**); (Diana Potts: **48a**); (Lindsey Mizerik: **35a-38a**). The sole evidence offered by Plaintiffs in support of their allegation of Mr. Breton's visible intoxication was the opinions of Drs. Evans and Gunaga, alleged experts in toxicology.

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[10]However, the fact that Mr. Marsh may have, himself, felt the effects of alcohol, does not necessarily mean that he was exhibiting signs of visible intoxication at the time of service sufficient to put an ordinary observer on notice.

Based on the blood alcohol content at the time of his autopsy, it was the opinion of these experts that Mr. Breton was visibly intoxicated when he was served alcohol at the Beach Bar.[11] For the following reasons, this evidence was insufficient to establish a prima facie case of visible intoxication under the statute, let alone rebut the statutory presumption of non-liability to which Defendant was entitled.

In support of the claim that expert witness testimony alone is sufficient to make out a prima facie case, Plaintiffs relied in the circuit court and in the Court of Appeals on the Michigan Supreme Court's reversal of the Court of Appeals' decision in *Dines v Henning*, 437 Mich 930; 466 NW2d 284 (1991) (*reversing* 184 Mich App 534 and adopting the dissenting opinion of J. Kelly). In his dissent, Judge Kelly reasoned that, given the existence of substantive witness testimony indicating that the AIP had been driving erratically and exhibiting loud and boisterous behavior, *in addition to* expert testimony regarding the AIP's blood alcohol content and the resulting inferences derived therefrom, the plaintiff had raised a prima facie case under the dram shop statute, sufficient to defeat the defendant's motion for summary disposition. *Dines*, 184 Mich App at 540-541. In so holding, Judge Kelly cited the Court of Appeals' decision in *Heyler v Dixon*, 160 Mich App 130; 408 NW2d 121

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[11]As noted earlier, Dr. Evans' opinion that Mr. Breton must have been visibly intoxicated while at the Beach Bar is limited to only that time when Mr. Breton allegedly returned to the Beach Bar, just prior to the accident and approximately one hour after having been served alcohol by anyone at the Beach Bar.

(1987), for the proposition that circumstantial evidence, and the inferences drawn therefrom, are sufficient to prove visible intoxication.

Both *Dines* and *Heyler*, however, are clearly distinguishable from the instant case, as in both cases there was *direct* evidence of the AIP's visible intoxication at or prior to the time alcohol was furnished. What is even more clear is that neither *Dines* nor *Heyler* stands for the proposition advanced by Plaintiffs -- namely, that expert testimony alone, despite all eye-witness testimony to the contrary, is sufficient to establish that an AIP was visibly intoxicated when served by the defendant establishment.

In *Dines*, the expert testimony regarding the AIP's blood alcohol content was but one piece of evidence offered by the plaintiff to prove visible intoxication. The plaintiff in *Dines* also offered actual eye-witness testimony as follows: (1) the AIP was driving recklessly prior to going to the defendant's bar; (2) a passenger in the AIP's vehicle demanded to be let out of the vehicle because of the AIP's erratic driving; and (3) a companion of the AIP left the defendant's bar because he felt that the AIP was exhibiting loud and boisterous behavior. *Dines*, 184 Mich App at 540-541. Judge Kelly's opinion holding that the plaintiff had raised a genuine issue of material fact as to the issue of visible intoxication was not based on the existence of expert testimony alone. To the contrary, Judge Kelly opined that the *combination* of significant factual eye-witness testimony of the AIP's conduct and demeanor, along with the expert's opinion, created a genuine issue of material fact sufficient to defeat

summary disposition. And, notably, the case did *not* involve the statutory presumption in the defendant's favor.

Heyler, *supra*, is even more distinguishable from the instant case, as the sufficiency of expert testimony in establishing a prima facie case of visible intoxication was not at issue. As in *Dines*, the plaintiff in *Heyler* presented ample evidence of visible intoxication -- this time in the form of admissions made by the AIP. In fact, the defendant AIP admitted both in deposition testimony as well as a sworn statement to the prosecutor that, "To a sober person, I believe I would appear, I would have appeared visibly intoxicated." *Id.*, 160 Mich App at 146. The existence of expert testimony, and its sufficiency to defeat either a prima facie case or a presumption of non-liability under the statute, was not even discussed. As such, Plaintiffs' and the Court of Appeals' reliance on *Heyler* was misplaced.[12]

Defendant does not dispute that, if qualified, toxicologic experts, such as Drs. Evans and Gunaga, may testify as to an individual's blood alcohol content. To go further, a toxicologic expert can testify whether, given the weight of an individual and the number of

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[12]*Miller v Ochampaugh*, 191 Mich App 48, 60; 477 NW2d 105 (1991), relied upon by the Court of Appeals, also does not support Plaintiffs' claim that circumstantial evidence alone is sufficient to establish prima facie liability under the dramshop statute. The *Miller* Court, in determining that the jury verdict in favor of the defendant licensee was against the great weight of the evidence, relied not upon circumstantial evidence, but upon the direct observational testimony of seven eye-witnesses who testified that the defendant AIP exhibited objective signs of intoxication when served alcohol by the defendant licensee. Accordingly, the sufficiency of circumstantial evidence in establishing dramshop liability was not at issue in *Miller*, and cannot support Plaintiffs' claim.

hours of drinking, it is likely that a typical person would be *intoxicated*. Liability under the statute, however, is not dependent upon a person's blood alcohol content or level of intoxication. The statute requires *visible* intoxication *at the time of sale* (*see*, *Heyler*, 160 Mich App at 145), and evidence of visible intoxication necessarily must include actual observation of the AIP. An expert's opinion which is not based on actual observation of the AIP at that critical moment in time when the AIP was allegedly served at a particular bar, is not relevant to the determination of visible intoxication.[13] Accordingly, the proffered expert opinions, by themselves, cannot credibly serve even as prima facie evidence of a violation, and they *certainly* cannot satisfy Plaintiffs' increased burden of production to overcome the statutory presumption of non-liability under §436.1801(8).

Neither *Dines* nor *Heyler* supports Plaintiffs' argument or the lower courts' holdings that expert testimony alone is sufficient to establish a prima facie case of visible intoxication. Indeed, some members of this court, in their dissent from the decision denying leave to

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[13]Presumably, an expert's opinion could be relevant to the determination of visible intoxication if that opinion is based, at least in part, upon actual observation of the AIP at the time of service. One could envision a factual scenario where a toxicologic expert offers his or her opinion of whether the AIP was visibly intoxicated based, in part, upon his or her own observation of the AIP (i.e. through videographic evidence taken at or near the time of service) or upon review of the testimony of eye-witnesses who actually observed the AIP at the critical time. However, neither Drs. Evans' and Gunaga's opinion in this case is based upon such observational evidence. Although Plaintiffs' experts' reports evidence that they reviewed the deposition testimony of eye-witnesses, each and every eye-witness testified that Mr. Breton did not exhibit objective signs of visible intoxication at the time of service at the Beach Bar. Accordingly, Plaintiffs' experts' opinions that Mr. Breton was visibly intoxicated could not be and were not based upon witnesses' actual observation of objective signs of visible intoxication.

appeal in *Easterbrook v TGI Friday's, Inc*, 463 Mich 957; 621 NW2d 219 (2001), have seriously questioned the sufficiency of expert testimony alone in establishing a prima facie case of visible intoxication under the dram shop statute and stated that this issue warranted consideration by the Court:

> There is no question that the disparity in individual reactions to alcohol explains why evidence of *observed* behavior is required as a precondition to liability, rather than mere quantitative evidence of intoxication. While toxicologic or pathologic evidence clearly can contribute to the determination of whether a person was, in fact, intoxicated at a given point, it is less clear the extent to which such evidence can, *by itself*, contribute to the determination that a particular person's intoxication should have been recognized by demeanor or behavior.

Id. (underlined emphasis added).

It is thus doubtful that a mere expert opinion, rendered not only without the support of direct, observational testimony but, indeed, rendered *contrary* to all such testimony, is sufficient to make out a prima facie case under the dramshop statute; certainly, the case law relied upon by the circuit court and the Court of Appeals (*Dines*, *Heyler* and *Miller*) does not support it.

C. Even if expert testimony alone is sufficient to establish a prima facie case of visible intoxication, it cannot be sufficient to rebut the statutory presumption of non-liability.

As explained above, if §436.1801(8) of the dramshop statute is to be given any effect whatsoever, something more than prima facie circumstantial evidence of visible intoxication is required to rebut the presumption. Even if the offered expert testimony and Mr. Marsh's testimony are sufficient to establish a prima facie case, the Court of Appeals erred in holding

such evidence was sufficient to rebut the statutory presumption.[14] Expert opinion testimony, particularly expert opinion testimony in direct contradiction to the testimony of numerous eye-witnesses, is not positive, unequivocal, strong and credible evidence - nor is it competent or credible. It cannot conclusively establish that Mr. Breton was visibly intoxicated when he was served at the Beach Bar, before traveling to and drinking at another bar. The expert opinion testimony offered by Plaintiffs did not factually establish that the Beach Bar served Mr. Breton when he was visibly intoxicated in violation of the statute.[15] Plaintiffs did not cite any legal authority in support of their argument that the circumstantial evidence presented by Drs. Evans and Gunaga was sufficient to rebut the statutory presumption. However, the unpublished decision of *Chiesa v Espinoza*, unpublished per curiam of the Court of Appeals (No. 190034, October 7, 1997) (**98a**), is instructive for its holding regarding the following: (1) the presumption applies when the undisputed evidence shows that the defendant was not the last establishment to have served the AIP and (2) in the

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[14]Although the issue on appeal pertains to the ability of Plaintiffs' experts' testimony to rebut the statutory presumption, Defendant does not concede that the expert testimony presented by Plaintiffs in this case was sufficient to establish a prima facie case that Mr. Breton was visibly intoxicated when served alcohol at the Beach Bar nor that Drs. Evans and Gunaga were qualified to opine as to what signs of visible intoxication, if any, were actually exhibited by Mr. Breton.

[15]In fact, Dr. Evans' opinion is irrelevant to the determination of Mr. Breton's degree of visible intoxication in light of the fact that his opinion is limited to the time *after* he was last served alcohol at the Beach Bar (i.e. at the Eagle's Nest and when he allegedly returned to the Beach Bar just before the accident (but was not served alcohol)).

absence of *any* eye-witness testimony, expert testimony as to visible intoxication, at the very least, was necessary to defeat a motion for summary disposition.

In *Chiesa*, the decedent AIP consumed approximately six beers at the defendant's bar from approximately 3:30 p.m. to approximately 6:30 p.m. The AIP then traveled to a friend's home, then to a Rite Aid Pharmacy where he purchased more beer and then back to the friend's home. The AIP left his friend's home at approximately 8:45 p.m. and eventually caused an accident in which the plaintiff was injured at approximately 11:00 p.m. The trial court granted the defendant bar summary disposition and the plaintiff appealed. The Court of Appeals agreed with the trial court, holding that the presumption of non-liability applied as it was undisputed that the AIP purchased alcohol from at least one other establishment after leaving the defendant's bar. The court further held that the plaintiff could not survive summary disposition as he failed to offer any evidence, expert testimony or otherwise, that the AIP was visibly intoxicated when he was served at the defendant's bar.

Chiesa is factually similar to the present case as it is undisputed that Mr. Breton was served alcohol by the Eagle's Nest after he left the Beach Bar and, accordingly, the statutory presumption applies. Unlike in *Chiesa*, Plaintiffs offered expert testimony regarding Mr. Breton's visible intoxication. However, defendant's position of non-liability was significantly stronger than that advanced by the defendant in *Chiesa* as, unlike the plaintiff in *Chiesa* who did not offer any evidence, including expert testimony, regarding whether the AIP was visibly intoxicated when he was served at the defendant's bar, defendant presented

ample factual, substantive, eye witness testimony evidencing that Mr. Breton was ***not*** visibly intoxicated when he was served at the Beach Bar. While the *Chiesa* court held that the lack of expert testimony was fatal to the plaintiff's case, given the lack of other evidence, it did not hold that expert testimony which directly contradicts eye-witness testimony would have been sufficient to rebut the statutory presumption of non-liability. Accordingly, the *Chiesa* court's decision supports the circuit court's decision to grant Defendant's motion in this case.

The expert opinion testimony offered by Plaintiffs in this case was, at the very most, prima facie evidence of visible intoxication. The expert opinion testimony was not the positive, unequivocal, strong and credible - nor even competent and credible - evidence necessary to defeat the statutory presumption that Mr. Breton was not visibly intoxicated when he was served at the Beach Bar. Accordingly, the circuit court properly granted defendant summary disposition of Plaintiffs' claims and the Court of Appeals clearly erred in reversing the circuit court.

RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellant, Beach Bar, Inc., respectfully requests this Honorable Court reverse the decision of the Court of Appeals and reinstate the Jackson County Circuit Court's grant of summary disposition in favor of Defendant.

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Dated: December 13, 2005
622200.1

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES D. KUENNER,
Personal Representative of the,
ESTATE OF ADAM W. KUENNER,
Plaintiff-Appellant,

v.

FREDERICK BRETON,
Personal Representative of the
ESTATE OF CURTIS J. BRETON,
HB RESORT ENTERPRISES, INC.,
a Michigan Corporation, a/k/a
THE EAGLES NEST,

Defendants

and BEACH BAR, INC.,
a Michigan Corporation, a/k/a THE BEACH BAR,
Defendant-Appellee.
_____/

Supreme Court
Case No. 127704

Court of Appeals
Case No. 247974

Jackson County Circuit Court
Case No. 01-6423-NI

THE ESTATE OF LANCE NATHAN REED,
by and through its Personal Representative,
LAWRENCE REED,
Plaintiff-Appellant,
v.

THE ESTATE OF CURTIS JASON BRETON,
by and through its Personal Representative,
FREDERICK BRETON, and HB RESORT
ENTERPRISES, INC., a Michigan Corporation,
a/k/a THE EAGLES NEST,
Defendants

and BEACH BAR, INC.,
a Michigan Corporation, a/k/a THE BEACH BAR,
Defendant-Appellee.
_____/

Supreme Court
Case No. 127703

Court of Appeals
Case No. 247837

Jackson County Circuit Court
Case No. 01-4350-NI

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

KATHY SZCZEPANSKI, being first duly sworn, deposes and says that she is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for defendant-appellant, BEACH BAR, INC., in the above-entitled cause of action and that on the 13th day of December 2005, she caused to be served a true copy of a DEFENDANT, BEACH BAR, INC.'S, BRIEF ON APPEAL;

DEFENDANT-APPELLANT'S APPENDIX; and a copy of this PROOF OF SERVICE upon the attorneys of record by enclosing a true copy of same in a well-sealed envelope addressed as follows:

John M. Ketzler, Esq.
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with full legal postage prepaid thereon and deposited in the United States mail.

Further, deponent saith not.

KATHY SZCZEPANSKI

Subscribed and sworn to before me, a
Notary Public, this 13th day of December, 2005.

Notary Public, Wayne County, Michigan
My commission expires:
622200.1

DONA E. LEWIS
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Apr 7, 2008